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21 **UNITED STATES DISTRICT COURT**
22 **DISTRICT OF ARIZONA**

23
24 THERESA BROOKE, a married woman
25 dealing with her sole and separate claim,

26 Case No:

27 Plaintiff,

28 **VERIFIED COMPLAINT**

vs.

21
22 Forest Villas Inn II, A Limited Liability
23 Company, an Arizona Limited Liability
24 Company D/B/A Forest Villas Hotel;

25 Defendant.

26
27 Plaintiff alleges:

28 **PARTIES**

1. Plaintiff Theresa Brooke is a married woman currently residing in Pinal
2 County, Arizona. Plaintiff is and, at all times relevant hereto, has been legally disabled,

1 confined to a wheel chair, and is therefore a member of a protected class under the
2 ADA, 42 U.S.C. § 12102(2); the regulations implementing the ADA set forth at 28 CFR
3 §§ 36.101 et seq. and AzDA §§41-1492 et seq. and its implementing regulations, R10-
4 3-401 et seq. Plaintiff ambulates with the aid of a wheelchair.

5 2. Defendant, Forest Villas Inn II L.L.C., an Arizona Limited Liability
6 Company D/B/A Forest Villas Hotel, owns and/or operates hotel at 3645 Lee Circle,
7 Prescott, AZ 86301, which is a public accommodation pursuant to 42 U.S.C. §
8 12181(7)(A) which offers public lodging services.

9 3. Plaintiff intends on lodging at Defendant hotel in the event Defendant
10 rectifies the alleged Title III allegations stated herein.

INTRODUCTION

11 4. Plaintiff Theresa Brooke brings this action against Defendant, alleging
12 violations of Title III of the Americans with Disabilities Act, 42 U.S.C. §§ 12101 et
13 seq., (the “ADA”) and its implementing regulations and A.R.S. Title 41, Chapter 9,
14 Article 8, §§41-1492 et seq. and its implementing regulations, R10-3-401 et seq. (the
15 “AzDA”)

16 5. Plaintiff is a disabled woman confined to a wheelchair. She brings this
17 civil rights action against Defendant for failing to design, construct, and/or own or
18 operate hotel facilities that are fully accessible to, and independently usable by, disabled
19 people. Specifically, Defendant’s hotel, which is a place of public accommodation, has
20 barriers to use of the pool. Defendant’s pool does not have acceptable means of entry
21 for disabled persons, notwithstanding that such modifications are readily achievable.
22 Therefore, Plaintiff seeks a declaration that Defendant’s hotel violates federal law and
23 an injunction requiring Defendant to install means of access in compliance with ADA
24 requirements so that the pool is fully accessible to, and independent usable by, disabled
25 individuals. Plaintiff further requests that, given Defendant’s historical failure to
26 comply with the ADA’s mandate, the Court retain jurisdiction of this matter for a
27 period to be determined to ensure that Defendant comes into compliance with the
28 relevant requirements of the ADA, and to ensure that Defendant has adopted and is

following an institutional policy that will, in fact, cause Defendant to remain in compliance with the law.

6. In compliance with R10-3-405(H)(1), Plaintiff's address is c/o Peter Strojnik, her attorney, 2415 East Camelback, Suite 700, Phoenix, Arizona 85016.

JURISDICTION AND VENUE

7. Jurisdiction in this Court is proper pursuant to 28 U.S.C. §§ 1331 and 42 U.S.C. § 12188.

8. Plaintiff's claims asserted herein arose in this judicial district and Defendant does substantial business in this judicial district.

9. Venue in this judicial district is proper under 28 U.S.C. § 1391(b) and (c) in that this is the judicial district in which a substantial part of the acts and omissions giving rise to the claims occurred.

THE ADA AND ITS IMPLEMENTING REGULATIONS

10. On July 26, 1990, President George H.W. Bush signed into law the ADA, a comprehensive civil rights law prohibiting discrimination on the basis of disability.

11. The ADA broadly protects the rights of individuals with disabilities in employment, access to State and local government services, places of public accommodation, transportation, and other important areas of American life.

12. Title III of the ADA prohibits discrimination in the activities of places of public accommodation and requires places of public accommodation to comply with ADA standards and to be readily accessible, and independently usable by, individuals with disabilities. 42 U.S.C. § 12181-89.

13. Title III states, *inter alia*, that "[i]t shall be discriminatory to afford an individual or class of individuals, on the basis of a disability . . . with the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other individuals." *See* 42 U.S.C. §12182(b)(1)(A)(ii). In addition, §12182(b)(1)(A)(iii) and §12182(b)(1)(B)] are intended to prohibit exclusion and segregation of individuals with disabilities and the denial of equal opportunities enjoyed by others, based on, among other things,

1 presumptions, patronizing attitudes, fears, and stereotypes about individuals with
 2 disabilities. 28 C.F.R. pt. 36, app. C (2011).

3 14. On July 26, 1991, the Department of Justice (“DOJ”) issued rules
 4 implementing Title III of the ADA, which are codified at 28 CFR Part 36.

5 15. Appendix A of the 1991 Title III regulations (republished as Appendix D
 6 to 28 CFR part 36) contains the ADA standards for Accessible Design (1991
 7 Standards), which were based upon the Americans with Disabilities Act Accessibility
 8 Guidelines (1991 ADAAG) published by the Access Board on the same date.

9 16. In 1994, the Access Board began the process of updating the 1991
 10 ADAAG by establishing a committee composed of members of the design and
 11 construction industries, the building code community, and State and local governmental
 12 entities, as well as individuals with disabilities.

13 17. In 1999, based largely on the report and recommendations of the advisory
 14 committee, the Access Board issued a notice of proposed rulemaking to update and
 15 revise its ADA and ABA Accessibility Guidelines.

16 18. The Access Board issued final publication of revisions to the 1991
 17 ADAAG on July 23, 2004 (“2004 ADAAG”).

18 19. On September 30, 2004, the DOJ issued an advanced notice of proposed
 19 rulemaking to begin the process of adopting the 2004 ADAAG.

20 20. On June 17, 2008, the DOJ published a notice of proposed rulemaking
 21 covering Title III of the ADA.

22 21. The long-contemplated revisions to the 1991 ADAAG culminated with
 23 the DOJ’s issuance of The 2010 Standards for Accessible Design (“2010 Standards”).
 24 The DOJ published the Final Rule detailing the 2010 Standards on September 15, 2010.
 25 The 2010 Standards consist of the 2004 ADAAG and the requirements contained in
 26 subpart D of 28 CFR part 36.¹

27 27

¹ Though the Effective Date of the 2010 Standards was March 15, 2011, the deadline for
 28 existing pools to comply did not become effective until January 31, 2013, at which time
 the 2010 Standards became enforceable through civil actions by private plaintiffs.

22. Notably, the lodging industry requested and received a number of extensions of time before the mandatory requirements of Section 242.2 of the 2010 Standards, concerning access to pools, became effective. Notwithstanding, the industry remains largely noncompliant with the requirements.

THE AzDA AND ITS IMPLEMENTING REGULATIONS

23. The AzDA and its implementing regulations, §§41-1492 et seq. and R10-3-401 et seq. provide similar prohibitions and remedies to the ADA and its implementing regulations.

ALLEGATIONS COMMON TO ALL COUNTS

24. Pursuant to CFR 36-302(1)(ii), on or about October 2, 2015, Plaintiff contacted Defendant's hotel for purposes of booking a room. Plaintiff inquired whether Defendant's hotel pool or Jacuzzi ("pool") had a lift or other means of access for disabled persons such as Plaintiff. Defendant's representative, Kate, stated that the hotel pool did not have a lift or other means of access. Plaintiff's agent, as part of due diligence investigation, independently verified the absence of a pool lift or other means of access for Plaintiff to the pool and Jacuzzi, and other ADA related violations.

25. Plaintiff has actual knowledge of at least one barrier related to her disability, that is, the pool is inaccessible to her by virtue of her confinement to a wheel chair, and is currently deterred from visiting Defendant's accommodation by this accessibility barrier. Therefore, she has suffered an injury-in-fact for the purpose of her standing to bring this action. Upon information and belief, there are other potential violations and barriers to entry that will be discovered and disclosed during the discovery and disclosure process.

26. Without the presence of a fixed pool lift or other means of permitting Plaintiff equal access to the pool, Plaintiffs disability prevents her from equal enjoyment of the pool.

27. Plaintiff intends to travel to the location of the Defendant's place of public accommodation in the future for business, pleasure or medical treatment.

28. As a result of Defendant's non-compliance with the ADA, Plaintiff will avoid and not stay at the Defendant's place of accommodation in the future.

1 29. The existence of barriers to use the pool at Defendant's hotel deterred
2 Plaintiff from staying or returning to seek accommodations at Defendant's hotel. Upon
3 information and belief, other disabled persons were deterred from staying there or
4 otherwise precluded from using the pool as guests due to the absence of pool lifts.

5 30. As a result of Defendant's non-compliance with the ADA, Plaintiff,
6 unlike persons without disabilities, cannot independently use Defendant's pool.

7 31. In violation of Section 242.2 of the 2010 ADA Standards, Defendant's
8 pool does not have at least one accessible means of entry in complying with Sections
9 1009.2 or 1009.3.

10 32. Plaintiff wishes to travel to the location of Defendant's place of public
11 accommodation for personal, business and/or medical treatment and wants to stay in
12 hotels there. But for the presence of architectural barriers at Defendant's hotel, Plaintiff
13 would consider staying at the Defendant's hotel.

14 33. Upon information and belief, though Defendant has centralized policies
15 regarding the management and operating of its hotel, Defendant does not have a plan or
16 policy that is reasonably calculated to make its entire hotel fully accessible to and
17 independently usable by, disabled people.

18 34. Plaintiff verified that Defendant's hotel lacks the mandatory elements
19 required by the 2010 Standards to make pools fully accessible to and independently
20 usable by disabled people.

21 35. As a disabled person, Plaintiff has a keen interest in whether public
22 accommodations that offer public lodging services are fully accessible to, and
23 independently usable by, the disabled, specifically including an interest in ensuring that
24 pools and spas possess all of the features required by the 2010 Standards.

25 36. Plaintiff, or an agent of Plaintiff, intends to return to Defendant's hotel to
26 ascertain whether it remains in violation of the ADA.

27 37. While the law certainly supports that the act of being a tester alone does
28 not negate an injury in fact, here, Ms. Brooke also alleges that she would return to the
premises if the alleged barriers were remedied. See Paragraph 3.

38. Plaintiff and other disabled persons have been injured by Defendant's discriminatory practices and failure to remove architectural barriers. These injuries include being deterred from using Defendant's facilities due to the inaccessibility of Defendant's pool and the denial of the opportunity to use said pool.

39. Without injunctive relief, Plaintiff and others will continue to be unable to independently use Defendant's hotel pool in violation of her rights under the ADA.

COUNT ONE
(Violation of Title III ADA)

40. Plaintiff incorporates all allegations heretofore set forth.

41. Defendant has discriminated against Plaintiff and others in that it has failed to make its public lodging services fully accessible to, and independently usable by, individuals who are disabled in violation of 42 U.S.C. § 12182(a) and § 12182(b)(2)(iv) and Section 242.2 of the 2010 Standards, as described above.

42. Defendant has discriminated against Plaintiff in that it has failed to remove architectural barriers to make its lodging services fully accessible to, and independently usable by individuals who are disabled in violation of 42 U.S.C. §12182(b)(A)(iv) and Section 242.2 of the 2010 Standards, as described above. Compliance with the requirements of section 242.2 of the 2010 Standards would neither fundamentally alter the nature of Defendant's lodging services nor result in an undue burden to Defendant.

43. In violation of Section 242.2 of the 2010 Standards, Defendant's pool does not have at least one accessible means of entry complying with Sections 1009.2 or 1009.3.

44. Pursuant to Section 44 of the IRS Code, Defendant may be able to obtain a tax credit and tax deduction where it complies with the ADA. *See generally* Dep’t of Justice, *Questions and Answers: Accessibility Requirements for Existing Swimming Pools at Hotels and Other Public Accommodations* (Mar. 1, 2013)². The tax credit is available to businesses that have total revenues of \$1,000,000 or less in the previous tax

² http://www.ada.gov/qa_existingpools_titleiii.htm

1 year or 30 or fewer full-time employees. This credit can cover 50% of the eligible
 2 access expenditures in a year up to \$10,250 (maximum credit of \$5,000).The tax credit
 3 can be used to offset the cost of undertaking barrier removal and alterations to improve
 4 accessibility. The tax deduction can be claimed for expenses incurred in barrier removal
 5 and alterations. *Id.*

6 45. Compliance with 42 U.S.C. § 12182(b)(2)(A)(iv) and Section 242.2 of the
 7 2010 Standards, as described above, is readily achievable by the Defendant due to the
 8 low costs of installing a fixed pool lift or lifts. *Id.* Readily achievable means that
 9 providing access is easily accomplishable without significant difficulty or expense.

10 46. Conversely, the cessation of compliance with the ADA law is also readily
 11 achievable by the removal of a fixed lift. Therefore, injunctive relief should issue
 12 irrespective of Defendant's potential voluntary cessation pursuant to the Supreme
 13 Court's announcement in *Friends of the Earth* case³.

14 47. Defendant's conduct is ongoing, and, given that Defendant has never
 15 complied with the ADA's requirements that public accommodations make lodging
 16 services fully accessible to, and independently usable by, disabled individuals, Plaintiff
 17 invokes her statutory right to declaratory and injunctive relief, as well as costs and
 attorneys' fees.

18 48. Without the requested injunctive relief, specifically including the request
 19 that the Court retain jurisdiction of this matter for a period to be determined after the

20 ³ *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189, 120 S.Ct.
 21 693, 145 L.Ed.2d 610 (2000):

22 It is well settled that a defendant's voluntary cessation of a challenged
 23 practice does not deprive a federal court of its power to determine the
 24 legality of the practice. If it did, the courts would be compelled to leave the
 25 defendant free to return to his old ways. In accordance with this principle,
 26 the standard we have announced for determining whether a case has been
 27 mooted by the defendant's voluntary conduct is stringent: A case might
 28 become moot if subsequent events made it absolutely clear that the
 allegedly wrongful behavior could not reasonably be expected to recur. The
 heavy burden of persuading the court that the challenged conduct cannot
 reasonably be expected to start up again lies with the party asserting
 mootness.

1 Defendant certifies that it is fully in compliance with the mandatory requirements of the
2 ADA that are discussed above, Defendant's non-compliance with the ADA's
3 requirements that its pool be fully accessible to, and independently useable by, disabled
4 people is likely to recur.

5 WHEREFORE, Plaintiff demands judgment against Defendant as follows:

- 6 a. A Declaratory Judgment that at the commencement of this action
7 Defendant was in violation of the specific requirements of Title III of the
8 ADA described above, and the relevant implementing regulations of the
9 ADA, in that Defendant took no action that was reasonably calculated to
10 ensure that all of its pools were fully accessible to, and independently
11 usable by, disabled individuals;
- 12 b. Irrespective of Defendants "voluntary cessation" of the ADA violation, if
13 applicable, a permanent injunction pursuant to 42 U.S.C. § 12188(a)(2)
14 and 28 CFR § 36.504(a) which directs Defendant to take all steps
15 necessary to bring its pools into full compliance with the requirements set
16 forth in the ADA, and its implementing regulations, so that the pools are
17 fully accessible to, and independently usable by, disabled individuals,
18 specifically including a pool lift as required by Sections 242.2 and 1009.2
19 of the 2010 Standards, and which further directs that the Court shall retain
20 jurisdiction for a period to be determined after Defendant certifies that its
21 pool is fully in compliance with the relevant requirements of the ADA to
22 ensure that Defendant has adopted and is following an institutional policy
23 that will in fact cause Defendant to remain fully in compliance with the
24 law;
- 25 c. Irrespective of Defendants "voluntary cessation" of the ADA violation, if
26 applicable, payment of costs of suit;
- 27 d. Irrespective of Defendants "voluntary cessation" of the ADA violation, if
28 applicable, payment of attorneys' fees pursuant to 42 U.S.C. § 12205, 28
CFR § 36.505 and other principles of law and equity and in compliance

with the “prevailing party” and “material alteration” of the parties’ relationship doctrines⁴ in an amount no less than \$3,500.00; and,

- e. Order closure of the Defendant's place of public accommodation until Defendant has fully complied with the ADA; and
 - f. The provision of whatever other relief the Court deems just, equitable and appropriate.

COUNT TWO

**(Violation A.R.S. Title 41, Chapter 9, Article 8, §§41-1492 et seq. AND
Implementing Regulations)**

49. Plaintiff realeges all allegations heretofore set forth.

50. Plaintiff has been damaged by the Defendant's non-compliance with the AzDA.

51. Pursuant to A.R.S. § 41-1492.08, and §41-1492.09, plaintiff has the right to enforce the AzDA by the issuance of injunctive relief.

52. Pursuant to A.R.S. § 41-1492.08, Plaintiff is entitled to preventive and mandatory relief.

53. Mandatory relief includes relief mandated by A.R.S. § 41-1492.09 obligating the Office of the Attorney General to take actions specified therein.

54. By a copy of this Verified Complaint, Plaintiff gives notice to the Office of the Attorney General of this Action.

55. Pursuant to A.R.S. § 41-1492.09(B)(2), Plaintiff is further entitled to such other relief as the Court considers appropriate, including monetary damages in an amount to be proven at trial, but in no event less than \$5,000.00.

56. Pursuant to A.R.S. § 41-1492.09(F), Plaintiff is entitled to attorney's fees and costs in an amount proven but in no event less than \$3,750.00.

WHEREFORE, Plaintiff demands judgment against Defendant as follows:

- a. A Declaratory Judgment that at the commencement of this action Defendant was in violation of the specific requirements of AzDA; and

⁴ As applicable to ADA cases, see *Coppi v. City of Dana Point*, Case No. SACV 11-1813 JGB (RNBx) (February, 2015)

- 1 b. Irrespective of Defendants “voluntary cessation” of the ADA violation, if
2 applicable, a permanent injunction pursuant to AzDA which directs
3 Defendant to take all steps necessary to bring its pools into full
4 compliance with the requirements set forth in the AzDA, and its
5 implementing regulations, so that the pools are fully accessible to, and
6 independently usable by, disabled individuals, specifically including a
7 pool lift as required by law, and which further directs that the Court shall
8 retain jurisdiction for a period to be determined after Defendant certifies
9 that its pool is fully in compliance with the relevant requirements of the
10 AzDA to ensure that Defendant has adopted and is following an
11 institutional policy that will in fact cause Defendant to remain fully in
12 compliance with the law; and
13 c. Irrespective of Defendants “voluntary cessation” of the ADA violation, if
14 applicable , the payment of costs of suit; and
15 d. Irrespective of Defendants “voluntary cessation” of the ADA violation, if
16 applicable, the payment of attorneys’ fees pursuant to A.R.S. § 41-
17 1492.09(F) and other principles of law and equity and in compliance with
18 the “prevailing party” and “material alteration” of the parties’ relationship
19 doctrines in an amount no less than \$3,750.00; and
20 e. Order closure of the Defendant’s place of public accommodation until
21 Defendant has fully complied with the AzDA; and
22 f. For damages authorized by § 41-1492.09(B)(2) in an amount no less than
23 \$5,000.00; and
24 g. The provision of whatever other relief the Court deems just, equitable and
25 appropriate.

26 **DEMAND FOR JURY TRIAL**

27 Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Plaintiff hereby
28 demands a jury trial on issues triable by a jury.

29 RESPECTFULLY SUBMITTED this 7th day of October, 2015.
30

STROJNIK P.C.



Peter Strojnik (6464)
2415 East Camelback Road, Suite 700
Phoenix, Arizona 85016
Attorneys for Plaintiff

VERIFICATION COMPLIANT WITH R10-3-405

I declare under penalty of perjury that the foregoing is true and correct.

DATED this 7th day of October, 2015.

/s/ Therese Brooke

Electronic Signature Authorized Theresa Brooke